

Exhibit B

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10 UNITED STATES DISTRICT COURT
11 DISTRICT OF NEVADA

12 JOSEPH O'SHAUGHNESSY, et al.

13 Plaintiffs,

14 v.

15 UNITED STATES OF AMERICA et al.,

16 Defendants.

Case No.: 2:20-cv-01039-WQH-EJY

17 TODD C. ENGEL,

18 Plaintiff,

19 v.

20 UNITED STATES OF AMERICA et al.,

21 Defendants.

Case No.: 2:20-cv-01040-WQH-EJY

**DECLARATION OF WARREN
MARKOWITZ, ESQ. IN SUPPORT
OF:**

**PLAINTIFFS' OPPOSITIONS TO
DEFENDANT'S MOTIONS TO
DISMISS**

**PLAINTIFFS' REQUESTS FOR
JUDICIAL NOTICE**

&

**PLAINTIFFS' REQUESTS FOR
FED.R.CIV.P. 56(D) RELIEF**

22 I, Warren Markowitz, Esq., declare and state as follows:

23 1. I am an attorney licensed to practice in all Courts within the State of New York and
24 also before the Ninth and Tenth Circuit Court of Appeals; I previously had the privilege of
25 representing Plaintiff Todd Engel *pro hac vice* in connection with his post-trial / pre-sentencing

1 motion practice and his appeal before the Ninth Circuit which resulted in a unanimous panel
2 decision vacating Mr. Engel's conviction.

3 2. I have personal knowledge of the facts and circumstances set forth in this
4 Declaration, and I respectfully submit same in support of Plaintiffs' Oppositions to Defendant's
5 Motions to Dismiss, Plaintiffs' Requests for Judicial Notice and 56(d) Relief in *Engel v. United*
6 *States*, 2:20-cv-01040 ("Engel Action") and the related action of *O'Shaughnessy v. United States*,
7 2:20-cv-01039 ("O'Shaughnessy Action").

8 3. In late October to early November 2017, during the United States' prosecution of
9 the Tier 1 Defendants (i.e., Cliven Bundy, Ryan Bundy, Ammon Bundy, Peter Santilli and Ryan
10 Payne), a Whistleblower Complaint authored by Bureau of Land Management ("BLM") Special
11 Agent and Lead Investigator Larry Wooten ("Wooten I") surfaced – one acknowledging multiple
12 violations of the Bundy Defendants' civil and constitutional rights by law enforcement officers in
13 connection with the United States' arrest, detention and prosecution of the Bundy Defendants,
14 including Mr. Engel.

15 4. Although the United States ultimately produced a copy of Mr. Wooten's
16 Whistleblower Complaint in a redacted format and under seal, that document was subsequently
17 filed unsealed by Cliven Bundy in connection with his Excerpts of Record on Appeal (Volume I)
18 following the United States appeal to the Ninth Circuit of Judge Navarro's Dismissal with
19 Prejudice of the Government's claims against the Tier 1 Defendants for "flagrant prosecutorial
20 misconduct." See Wooten I attached hereto as **Exhibit 1**; see also Transcript of Proceedings
21 regarding the Bundy Defendants' Motion to Dismiss attached hereto as **Exhibit 2**.

22 5. After securing a copy of Mr. Wooten's Whistleblower Complaint, I immediately
23 moved the District Court for a new trial on Mr. Engel's behalf and expressly requested the
24 opportunity to depose Mr. Wooten regarding the Government's abhorrent conduct referenced in
25 that memorandum.

26 6. Recognizing that Mr. Wooten was a critical witness who would refute the
27 existence of probable cause to arrest, detain and prosecute Mr. Engel, I located him and,
28

1 thereafter, spoke with him telephonically regarding his Whistleblower Complaint and the
2 underlying facts referenced therein.

3 7. During that call, Mr. Wooten identified a follow-up memorandum that he authored
4 in which Mr. Wooten further detailed, among other things: multiple civil and constitutional law
5 violations against the Bundy Defendants; the United States' intentional withholding / non-
6 disclosure of exculpatory *Brady* information (e.g., surveillance-camera evidence, FBI "302"
7 investigative reports regarding snipers, Tactical Operations Center or "TOC" log records and
8 threat assessments); and flagrant misconduct by the Government agents, including, without
9 limitation, the prosecutors assigned to the case ("Wooten II").

10 8. Thereafter, I immediately made a demand upon the United States for the
11 production of the Wooten II memorandum. Although the United States refused to provide same,
12 it ultimately allowed me to view a redacted copy of it and take notes regarding its content. I was
13 not permitted to copy the memorandum, however, and, due to its designation by the Government
14 as a document subject to the underlying Confidentiality & Protective Order, it severely limited
15 my ability to effectively use same in connection with post-trial motion practice and Mr. Engel's
16 appeal.

17 9. The Wooten II memorandum, however, went in to much greater detail regarding
18 the misconduct and unlawful acts by the United States in "working-up" the underlying criminal
19 case, including, without limitation, deviations from BLM policies / procedures regarding
20 impoundment operations; the intentional suppression of exculpatory information bearing on the
21 existence (or lack thereof) of probable cause to arrest, detain and prosecute the Bundy
22 Defendants, including, without limitation, Mr. Engel; potential crimes by governmental
23 employees in connection with their misconduct, "cover-ups," and the destruction / shredding of
24 material evidence; and the Government's concealment of their actual use of government snipers,
25 their presence on the Bundys' property, and that the Bundy cattle were actually in good physical
26 condition. Although I am willing to make my notes available to the Court for an in camera
27 inspection, the best evidence regarding these issues would be the deposition testimony of
28 Mr. Wooten himself (which has yet to occur) as supplemented by the Wooten II memorandum.

1 Notwithstanding the foregoing, it is my understanding that a copy of the Wooten II memorandum
2 was also filed unsealed by Cliven Bundy in connection with his Excerpts of Record on Appeal
3 (Volume I) and a copy of same is attached hereto as **Exhibit 3**.

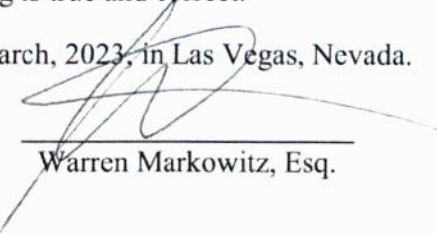
4 10. Although the Ninth Circuit Court of Appeals subsequently overturned Mr. Engel's
5 conviction and the United States ultimately dismissed its criminal complaint against him, the
6 damage done to Mr. Engel's reputation, not to mention the loss of his life and livelihood during
7 the four and one-half (4½) years he was incarcerated, merely because he was present and
8 identified, cannot be overstated.

9 11. Mr. Engel's presence at the Cattle Impoundment Operation in support of the
10 protestors and his assistance of law enforcement officers that day (attempting to de-escalate a
11 volatile situation created by the Government) was in full accord with his First Amendment rights.

12 12. Similarly, although his possession of a firearm that was, in retrospect, not the best
13 decision, it, nevertheless, was not unlawful as it was his absolute right to carry same under the
14 Second Amendment.

15 13. I declare under the penalty of perjury under the laws of the United States and the
16 State of Nevada that the foregoing is true and correct.

17 Signed this 22nd day of March, 2023, in Las Vegas, Nevada.

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20 Warren Markowitz, Esq.
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